it for the removal of any earth from the excavated channel, derived from the sliding from slopes of the same, the dredging company, before commencing work, addressed a letter to General Smith, engineer in charge, requesting to know whether its contract would be construed as excluding payment for removing such earth. General Smith replied "that payment will be made for the quantity of material removed within the designated lines of excavation as determined by measurement before and after the dredging, and that such measurement does not include material which comes in from the sides during the progress of dredging." The letter stated: "I deem it proper to add that this is in conformity with the instructions received from the chief of engineers on the subject." The dredge company thereupon replied, protesting against this construction, declaring that it was not bound thereby, and that its performance of the work must not be construed as an acceptance of the correctness of such interpretation.

The work was commenced. Whenever a payment was made under the contract the dredge company, in receiving the same, asserted that it was entitled to be paid for removing any earth which had fallen into the excavation from the slopes and which had been removed by it, and on payment for such work being refused it protested. On June 21, 1901, while the work on the contract was proceeding, the dredge company made a supplementary contract, increasing the amount to be by it excavated, in accordance with the terms and specifications of the prior contract, from 900,000 to 1,300,000 cubic yards. As the work thereafter progressed under both contracts payments were continued to be made by the Government and received by the dredge company under protest, as before stated, until the work under the contracts was finally completed.

The court below found:

"The amount of material that fell or slid from the sides or slopes of the vertical walls in front of the dredge and that was removed thereby along with the excavated material within the

designated lines for dredging as provided by the contract, was more than 30,000 cubic yards, which, at the contract price of $10\frac{7}{8}$ cents per cubic yard, would amount to over $3,000."

In the opinion delivered by the court below it was said:

"We are therefore of the opinion that the specifications, which are made part of the contract, are plain and unambiguous, and that they not only furnish the basis of *measurement in place* of the material to be excavated, but that the measurements made by the engineer in charge were in strict accord therewith. This being so, any other method of *measurement in place*, even though customary, is excluded by the terms of the contract, and, therefore, expert testimony is not admissible to explain language that needs no explanation."

And for these reasons the right of the dredge company to recover was denied. A new trial was asked, among others, on the ground that error had been committed in not finding the trade meaning of the words, "measured in place," and because the amount of cubic yards of earth which had slid in from the sides or slopes of the excavation while the contract was being performed, and which had been removed by the company, had not been fixed at 260,430 instead of "as above 30,000," as stated in the findings. In addition a request was made that the findings be amended so as to qualify the finding that the price paid should be $10\frac{7}{8}$ cents for each and every cubic yard of material dredged, measured in place, by adding the words, "the same being the trade meaning or understanding of the words 'measured in place.'" In addition it was asked that the finding as to the amount of cubic yards removed of matter that fell from the sides or slopes be increased from above 30,000 to 260,430. The motion for a new trial and the motion to amend the findings were overruled. The court, in its reasons for denying the motion, while stating that certain expert testimony had been offered as to the meaning of the words "measured in place," further stated that it had declined to consider the same and make a finding thereon,

as it concluded, as said in its previous opinion, that the import of the words "measured in place," as used in the contract, was so free from ambiguity that it did not consider the testimony relevant. This was based upon the opinion that whatever might be the commercial signification of the words that meaning could not be imported into the contract for the purpose of destroying its plain and obvious intendment when the terms of the entire contract and the specifications forming part of the same were given their proper weight.

The errors complained of are all embraced under the following headings:

a. The refusal of the court to receive and consider testimony offered as to the trade meaning of the words "measured in place" and its refusal to make a finding on the subject. It being contended that the action of the court in refusing to amend its findings and the statement, in its opinion, that it declined to consider such testimony, adequately preserves the question for review.

b. The refusal of the court to find the precise amount removed of earth which slid in from the sides or slopes, thus leaving the finding uncertain on that subject.

c. The attributing of conclusive efficacy to the action of the officer in charge.

And finally,

d. The construction given by the court to the contract.

It is apparent that the question of construction last stated lies at the foundation of all the assignments, and therefore first commands consideration. We say this because if it be that the court below was correct in its conclusion that the contract gave to the words "measured in place," as therein used, a plain and unambiguous signification, it is obvious that the abstract or commercial meaning of those words, upon the hypothesis that they have such meaning, was rightly held to be irrelevant. And it is equally plain that if the court below rightly construed the contract in the particular mentioned it will be unnecessary to consider the effect which was given

to the action of the officer in charge, since that action was in accordance with the meaning which the court gave to the contract.

Coming to consider the contract, we are of opinion that the court below correctly enforced its self-evident meaning. The requirement that the amount of material removed should be paid for by the cubic yard measured in place, and should be determined by surveys made before dredging is commenced and after its completion, clearly in and of itself established a method for fixing the amount of material which might be excavated, and which was to be paid for, absolutely incompatible with the contention that the contract contemplated that payment should be made for excavated earth which might slide into the channel from the slopes of the same during the progress of the work. And this is fortified by the requirement as to the location of the stakes and the keeping of them continually in place during the performance of the work under the contract. It is, moreover, additionally sustained by the provision, "that no extra allowance will be made for excavating material different from that herein prescribed," and by the stipulations, "that work done outside of the designated lines of excavations or below the specified depth will not be paid for," and "that any material deposited other than that specified and agreed upon must be removed by the contractor at his own expense." When these provisions are read in connection with the specification stating that "no guarantee is given as to the nature of the bottom, but, as far as it is known, it is sand, mud, clay and gravel, bidders are requested to satisfy themselves as to this point, and to examine all other local conditions, as it will be assumed that their bids are based upon personal information" in connection with the statement of the approximate quantity, and the further condition that "no claim will be made against the United States on account of any excess or deficiency, absolute or relative in the same," we think the conclusion is beyond reasonable controversy that the contract, by its express terms and without ambiguity, ex-

cludes the possibility of holding that earth which might slide from the slopes during the excavation was to be paid for by the United States. To separate the words "measured in place" from all the other provisions of the contract in order to give them an assumed or proven abstract trade meaning repugnant to their significance in the contract would be to destroy and not to sustain and enforce the contract requirements. Lest our silence upon the subject may give rise to misconception, we deem it well to observe that even if the original contract was susceptible of a different construction from that which we hold arises from its plain import, such result could have no possible influence on the asserted claim of the dredge company, in so far as that claim is based upon excavation done under the supplementary contract. We say this because that contract was made with the full knowledge of the meaning affixed by the United States to the terms of the contract, and which had been insisted upon in the carrying on of the previous dredging operations.

Affirmed.